Petition

81-1813

No.

Supreme Court, U.S.
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In the Supreme Court of the United States

October Term, 1981

ROBERT FOUST, ROBERT ERVIN,
and CHARLES CRAMER,
Petitioners,

vs.

MARK ALFRED GARMON,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether the state personal injury statute of limitations applies in actions for personal injuries under 42 U.S.C. § 1983?

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The petitioners Robert Foust, Robert Ervin, and Charles Cramer respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this case on January 5, 1982.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, *infra*, A1-A14) is reported at 668 F.2d 400. The opinion of the District Court (App. B, *infra*, A15-A17) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on January 5, 1982, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1988 provides in relevant part:

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title 'CIVIL RIGHTS,' and of Title 'CRIMES,' for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry out the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court

> having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. * * *

Iowa Code § 614.1 provides in relevant part:

> Actions may be brought within the times herein limited, respectively, after their causes accrue, and not afterwards, except when otherwise specially declared:
>
> * * * *
>
> 2. *Injuries to person or reputation—relative rights —statute penalty.* Those founded on injuries to the person or reputation, including injuries to relative rights, whether based on contract or tort, or for a statute penalty, within two years.
>
> * * * *
>
> 4. *Unwritten contracts—injuries to property—fraud—other actions.* Those founded on unwritten contracts, those brought for injuries to property, or for relief on the ground of fraud in cases heretofore solely cognizable in a court of chancery, and all other actions not otherwise provided for in this respect, within five years, except as provided by subsection 8.

STATEMENT OF THE CASE

This case arises out of a narcotics investigation in December, 1975. Robert Foust, a Des Moines police officer, obtained a warrant from a state court judge to search Mark Alfred Garmon's room. On December 18, 1975, Des Moines police officers Charles Cramer and Robert Ervin executed the warrant by searching Garmon's room while he was present. They discovered a controlled substance and arrested Garmon for possession of it. Garmon was then taken to the City jail. He was released the same day, December 18, 1975.

On December 20, 1977, more than two years later, Garmon filed a personal injury action under 42 U.S.C. § 1983 against Officers Foust, Ervin, and Cramer, Defendants, in the United States District Court for the Southern District of Iowa. The jurisdiction of the district court was invoked under 28 U.S.C. § 1343. As a result of the events on December 18, 1975, Garmon claimed he suffered the following personal injuries: severe emotional distress; damage to his reputation; and damage to his earning capacity (App. A, *infra*, A4).

The Defendants filed an answer in which they pleaded that the Plaintiff's action was barred by the Iowa two-year statute of limitations for personal injury actions, Iowa Code § 614.1(2). Under this statute, actions for injuries to the person or reputation must be brought within two years. The Defendants then raised this defense with the District Court by a motion for summary judgment. The Honorable Harold D. Vietor, United States District Judge, denied the motion, because he held that the Iowa five-year general, "catch-all" statute of limitations, Iowa Code § 614.1(4), applied instead of the two-year personal injury statute of limitations. The applicable part of the five-year

statute provides that all actions not otherwise provided for must be brought within five years.

Although Judge Vietor relied upon case law from the Southern District of Iowa in applying the five-year statute, he acknowledged that there also was case law in the Southern District of Iowa for applying the two-year statute (App. B, *infra*, A15-A16, A17). He went on to note that the decisions of the Eighth Circuit Court of Appeals had reached seemingly irreconcilable results on this issue (App. B, *infra*, A17). Therefore, in addition to denying the Defendants' motion, Judge Vietor certified the case for interlocutory appeal (*Id.*).

The Defendants sought permission from the Eighth Circuit to appeal under 28 U.S.C. § 1292(b), and the Eighth Circuit granted permission for the appeal. The case was argued to the Eighth Circuit *en banc*. On January 5, 1982, the Eighth Circuit filed its decision. In it, the Eighth Circuit affirmed the District Court and held that the general, "catch-all" statute of limitations applies to personal injury actions under § 1983 instead of the personal injury statute of limitations.

REASONS FOR GRANTING WRIT

1. The decision below is in conflict with decisions of other courts of appeals which hold the state personal injury statute of limitations is applicable to personal injury actions under 42 U.S.C. § 1983.

In this case, the question is whether the state personal injury statute of limitations should be applied to personal injury actions under § 1983. There is a substantial conflict of opinion on this issue. In the Eighth Circuit, there are cases adopting the personal injury statute, and there are other cases rejecting it. In the first group, a personal

injury action under § 1983 is treated as a personal injury action, and the state statute for personal injury actions is applied. *Savage v. United States*, 450 F.2d 449 (8th Cir. 1971), *cert. denied*, 405 U.S. 1043 (1972); *Johnson v. Dailey*, 479 F.2d 86 (8th Cir.), *cert. denied*, 414 U.S. 1009 (1973) (Iowa two-year personal injury statute). In the second group, a personal injury action under § 1983 is treated as a special action, because § 1983 is treated as a broad, statutory remedy for deprivations of constitutional rights. Under this interpretation, the Eighth Circuit has applied the statute of limitations for actions under a statute or the general statute of limitations. *Glasscoe v. Howell*, 431 F.2d 863 (8th Cir. 1970). The conflict in these decisions is exemplified in the Southern District of Iowa. Some district judges apply the two-year personal injury statute of limitations to personal injury actions under § 1983. *E.g., Rosales v. Lewis*, 454 F. Supp. 956 (S.D. Iowa 1978). Other district judges apply the five-year general, "catch-all" statute of limitations. *E.g., Barrett v. Wichael*, 387 F. Supp. 1263 (S.D. Iowa 1974).

The Eighth Circuit heard this case *en banc* to resolve the conflict. In doing so, the Eighth Circuit acknowledged the conflict in its own opinions, and it noted that the other circuits were in conflict on the issue as well (App. A, *infra*, A6-A7). The Eighth Circuit characterized one approach as the tort analogy and cited cases from the Third, Fourth, Fifth, and Sixth Circuits in which the state personal injury or tort statute of limitations was applied to a personal injury action under § 1983 (*Id.*). The Eighth Circuit then noted that the Second, Fifth, Sixth, Seventh, and Ninth Circuits had applied the general statute of limitations or the one for statutory actions (*Id.*). This conflict is described in greater detail in a recent annotation on the statute of limitations applicable to a civil rights action

brought under § 1983 at 45 ALR Fed 548 (1979). In the annotation, the author summarized the problem created by this conflict and the need for this Court to provide further guidance on the statute of limitations issue. He said:

> "With the flood of recent litigation under 42 USCS § 1983, the question of what statute of limitations applies to a § 1983 action is an issue of great importance, and one which has caused litigants much uncertainty. * * *
>
> * * * *
>
> Although the Supreme Court has indicated that state statutes of limitations ordinarily are applied in federal civil rights litigation the Supreme Court has not set forth standards which lower federal courts can consider in selecting and applying state statutes of limitations to federal civil rights actions. In the absence of such guidelines from the Supreme Court, or congressional enactment of a federal statute of limitations for § 1983 actions, the uncertainty, confusion, and lack of uniformity in selecting the applicable statute of limitations in § 1983 suits are likely to remain". Annot., 45 ALR Fed at 553-554.

2. The decision below is in conflict with decisions of this Court on the applicable statute of limitations in actions under 42 U.S.C. § 1983.

In this case Garmon commenced his personal injury action in federal court under § 1983 after the time for filing a personal injury action in state court had expired. This presents the question of whether a plaintiff can circumvent the state personal injury statute of limitations by filing his case in federal court under § 1983. Under the Eighth Circuit's decision, he can. However, this decision is in conflict with the decisions of this Court on the matter.

In recent years, this Court has criticized decisions which permitted litigants to avoid the state statute of limitations. In *Board of Regents v. Tomanio*, 446 U.S. 478, 484 (1980), the Court said these statutes are more than technical obstacles to be circumvented if possible. It said these statutes were fundamental to a well-ordered judicial system. *Board of Regents*, 446 U.S. at 487. In *United States v. Kubrick*, 444 U.S. 111 (1979), the Court also emphasized the importance of these statutes and criticized decisions avoiding them. The Court said that the courts should recognize the plea of limitations as a meritorious defense and that the statute of limitations should not be construed to defeat its obvious purpose, which is to encourage the prompt presentation of claims. 444 U.S. at 117.

Obviously, the Court looks with disfavor upon decisions interpreting federal statutes to permit litigants to avoid the statute of limitations. Although the Eighth Circuit's decision permits a litigant to avoid the state personal injury statute of limitations, the Eighth Circuit justified its decision by the nature of § 1983. It said the personal injury statute would "unduly cramp § 1983 as a broad, statutory remedy" (App. A, *infra*, A12). Under this interpretation of § 1983, it is improper to apply the personal injury statute of limitations to a personal injury action under § 1983, because § 1983 provides a special remedy.

This interpretation is inconsistent with the decisions of this Court. The federal courts cannot disregard the personal injury statute merely because § 1983 provides a special remedy. Under 42 U.S.C. § 1988, the federal courts must refer to the most analogous state statute of limitations, and the federal courts can disregard this statute only when it is inconsistent with federal law. *Board of Regents*, 446 U.S. at 484-485. The fact that § 1983 provides a special

remedy does not mean the most analogous state law is inconsistent. In *Robertson v. Wegmann*, 436 U.S. 584 (1978), the Court rejected the notion that the most analogous statute could be ignored because of the remedy provided by § 1983. The Court said:

> "It is true that § 1983 provides 'uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation.' *Mitchum v. Foster*, [407 U.S. 225, 239 (1972)]. That a federal remedy should be available, however, does not mean that a § 1983 plaintiff (or his representative) must be allowed to continue an action in disregard of the state law to which § 1988 refers us. A state statute cannot be considered 'inconsistent' with federal law merely because the statute causes the plaintiff to lose the litigation. * * *" 436 U.S. at 593.

In order to disregard the state statute, the statute must be inconsistent with federal law, and in this case no such inconsistency exists. There is nothing about a two-year statute which is inconsistent with federal law. In *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975), the Court applied a one-year statute in a civil rights case. Furthermore, there is nothing inconsistent with federal law about applying the personal injury statute of limitations to personal injury actions under § 1983. Indeed, there is considerable authority from other circuits for doing so. Annot., 45 ALR Fed 548, 563-569 (1979).

In the end, one is left with the argument from *Glasscoe v. Howell*, 431 F.2d 863, 865 (8th Cir. 1970) that § 1983 is a statutory claim for relief different from any which would exist at common law in the absence of the statute. This is the argument the Eighth Circuit adopted in this

case (App. A, *infra*, A7-A8, A14). Under it, claims under § 1983 must be treated differently, because they are statutory claims. Again, the Eighth Circuit is in error.

By the enactment of § 1983, Congress did not create a new statutory cause of action to which the personal injury statute would be inapplicable. First, § 1983 does not create any substantive rights; there is no such thing as a violation of § 1983. *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 617 (1979). Second, there is nothing about the policies embodied in § 1983 which make the reference to the state personal injury statute inappropriate in personal injury actions under § 1983. *See Board of Regents*, 446 U.S. at 488. Finally, there is nothing in general about actions in federal courts based upon federal statutes which would make it improper to apply the personal injury statute. As the Court explained in *Board of Regents*, unless Congress has spoken to the contrary, it does not intend to avoid state policies of repose by the mere creation of a "cause of action" or a "claim for relief". 446 U.S. at 488.

The Eighth Circuit's decision is obviously contrary to the decisions of this Court, and so it is in need of correction. However, it is also in need of correction, because of its affect upon the federal system. Under the Eighth Circuit's decision, a party can use § 1983 as a subterfuge to avoid the statute of limitations for personal injury actions. This debases § 1983. Instead of providing a remedy for the misuse of power by local officials, § 1983 becomes a vehicle for the misuse of federal courts by litigants. This is contrary to the purposes of § 1983, and it is contrary to the decisions of this Court.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted,

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Appendix

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 80-2206

Mark Alfred Garmon,
Appellee,

v.

Robert Foust; Robert Ervin and Charles Cramer,
Appellants.

Appeal from the United States District Court
for the Southern District of Iowa.

Submitted: September 15, 1981
Filed: January 5, 1982

Before LAY, Chief Judge; HEANEY, BRIGHT, ROSS, STEPHENSON, HENLEY, McMILLIAN, and ARNOLD, Circuit Judges, *En Banc*.

BRIGHT, Circuit Judge.

In this appeal we consider which state statute of limitations applies in a federal civil rights action brought under 42 U.S.C. § 1983: the statute governing an action based on the underlying conduct of the defendant, or the state's general, "catch-all" statute of limitations. Resolving inconsistent applications of the Iowa statutes of limitations in

section 1983 actions, we hold the general statute of limitations applicable.

Mark Alfred Garmon brought this action under 42 U.S.C. § 1983 against three members of the Des Moines, Iowa, police force. He charged them with violating his civil rights under the fourth and fourteenth amendments in an incident that occurred on December 18, 1975, slightly more than two years prior to his filing of the complaint. The police officers moved for summary judgment on the ground that Iowa's two-year statute of limitations, Iowa Code § 614.1 ¶ 2[1] governing actions for injuries to person or reputation barred the action. The district court[2] denied the motion, ruling Iowa's five-year statute of limitations governing "all other actions," Iowa Code § 614.1 ¶ 4,[3] the

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1. Chapter 614 of the Iowa Code prescribes "Limitations of Actions." Section 614.1 specifies the relevant period as follows:

614.1 *Period*

Actions may be brought within the times herein limited, respectively, after their causes accrue, and not afterwards, except when otherwise specially declared:

* * * *

2. *Injuries to person or reputation—relative rights—statute penalty.* Those founded on injuries to the person or reputation, including injuries to relative rights, whether based on contract or tort, or for a statute penalty, within two years.

2. The Honorable Harold D. Vietor, United States District Judge for the Southern District of Iowa.

3. Section 614.1 ¶ 4 of the Iowa Code provides:

614.1 *Period*

Actions may be brought within the times herein limited, respectively, after their causes accrue, and not afterwards, except when otherwise specially declared:

* * * *

4. *Unwritten contracts—injuries to property—fraud—other actions.* Those founded on unwritten contracts, those brought for injuries to property, or for relief on the ground of fraud in cases heretofore solely cognizable in a court of chancery, and all other actions not otherwise provided for in this respect, within five years, except as provided by subsection 8.

more appropriate limitations provision. Noting the substantial difference of opinion regarding the applicable Iowa statute of limitations in section 1983 cases, however, the district court certified its interlocutory order for appeal under 28 U.S.C. § 1292(b). We permitted the appeal to resolve inconsistencies in similar cases arising in Iowa, and to clarify the law in this circuit on the appropriate state statute of limitations applicable to section 1983 cases. We now affirm the order of the district court applying Iowa's general statute of limitations in this civil rights action.

I. *Factual Background.*

On December 17, 1975, defendant Robert Foust of the Des Moines Police Department, received from employees of Drake University a package addressed to Mark Garmon that had arrived at the student resident hall where Garmon lived. Without a search warrant or probable cause, Foust took the package to a state judge, who ordered it opened. After discovering that the package contained a green, leafy substance, the officer resealed the package.

The state court issued a warrant on December 18, 1975, authorizing the search of Garmon's dormitory room. Foust, and codefendants Robert Ervin and Charles Cramer, searched plaintiff's room and discovered a controlled substance.

Garmon was charged under Iowa law with possession of a controlled substance. The seizure and search of the package without a warrant or probable cause, however, had tainted all subsequent actions including the issuance of the warrant authorizing the police to search Garmon's room. As a result, Garmon's court-appointed attorney successfully moved to suppress the evidence obtained from the package and from plaintiff's dormitory room. The State subsequently dropped the criminal charges.

On December 20, 1977, more than two years later, Mark Garmon instituted this action against Des Moines policemen Robert Foust, Robert Ervin, and Charles Cramer under 42 U.S.C. § 1983. The complaint alleged that in December 1975, defendants' actions under color of state law deprived Garmon of

> [t]he right * * * to be secure in his person and effects against unreasonable search and seizure under the Fourth and Fourteenth Amendments to the Constitution of the United States[, and]
>
> [t]he right * * * not to be deprived of life, liberty or property without due process of law, secure[d] by the Fourteenth Amendment to the Constitution of the United States.

As a result of the illegal search and seizure, Garmon claimed that he suffered severe emotional distress, damage to his reputation, and impaired earning capacity.

The defendant policemen asserted Iowa's two-year statute of limitations, Iowa Code § 614.1 ¶ 2 as a defense. The district court ruled section 614.1 ¶ 2 inapplicable, however, and held the action timely under Iowa's general, five-year statute of limitations. Iowa Code § 614.1 ¶ 4. The controversy before this court focuses on which of the following state statutory provisions governs suits brought under section 1983:

> CHAPTER 614. LIMITATIONS OF ACTIONS
>
> 614.1 *Period*
>
> Actions may be brought within the times herein limited, respectively, after their causes accrue, and not afterwards, except when otherwise specially declared:
>
> * * * *

2. *Injuries to person or reputation—relative rights—statute penalty.* Those founded on injuries to the person or reputation, including injuries to relative rights, whether based on contract or tort, or for a statute penalty, within two years.

* * * *

4. *Unwritten contracts—injuries to property—fraud—other actions.* Those founded on unwritten contracts, those brought for injuries to property, or for relief on the ground of fraud in cases heretofore solely cognizable in a court of chancery, and *all other actions not otherwise provided for in this respect, within five years, except as provided by subsection 8.* [Iowa Code § 614.1 ¶¶ 2, 4 (Supp. 1981) (emphasis added).]

II. *Discussion.*

When Congress established a cause of action for deprivation of civil rights, 42 U.S.C. § 1983, it did not include a period of limitations for such suits. Both the Rules of Decision Act,[4] and section 1988[5] of the Civil Rights Act,

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4. The Rules of Decision Act specifies:

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply. [28 U.S.C. § 1652 (1976).]

5. 42 U.S.C. § 1988 provides in relevant part:

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable

(Continued on following page)

however, indicate that state statutes of limitations govern unlimited federal causes of action.

Although the Supreme Court has never addressed the specific question presented in this case, it has stated as a general rule, that,

> when a federal statute creates a wholly federal right but specifies no particular statute of limitations to govern actions under the right, the general rule is to apply the state statute of limitations for analogous types of actions. See *Auto Workers v. Hoosier Corp.*, 383 U.S. 696; *Cope v. Anderson*, 331 U.S. 461; *Campbell v. Haverhill*, 155 U.S. 610[.] [*Chevron Oil Co. v. Huson*, 404 U.S. 97, 104 (1971).]

Since 1914, when the Supreme Court decided *O'Sullivan v. Felix*, 233 U.S. 318 (1914), federal courts have "borrowed" state statutes of limitations in civil rights suits, by applying "the most appropriate one provided by state law." *Johnson v. Railway Express Agency*, 421 U.S. 454, 462 (1975).

This approach has not yielded uniform results among the federal courts because of the differing analogies drawn between section 1983 actions and state remedies. Courts have variously adopted the state statute of limitations applicable to the state common law tort action for the conduct

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Footnote continued—

> remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature in the infliction of punishment on the party found guilty. [42 U.S.C. § 1988 (1976).]

underlying the section 1983 action,[6] the statute of limitations for causes of action created by statute,[7] or the general, "catch-all" statute of limitations applicable to causes of action not specifically governed by other statutes of limitations.[8]

Various panels of this court have also taken inconsistent approaches to the application of state statutes of limitations in section 1983 actions. A comparison of *Glasscoe v. Howell*, 431 F.2d 863 (8th Cir. 1970) (rejecting the tort analogy) with *Savage v. United States*, 450 F.2d 449 (8th Cir. 1971), *cert. denied*, 405 U.S. 1043 (1972) (accepting the tort analogy) exemplifies the split within the Eighth Circuit.

In *Glasscoe*, an Arkansas resident brought an action under section 1983 against Arkansas police officers, alleging that they had deprived him of his civil rights by arresting him with unnecessary force and violence. Rejecting a tort analogy in the application of a state statute of limitations, the court refused to hold the action time-barred under the one-year Arkansas statute of limitations governing actions for false imprisonment and assault and battery.

> We do not feel that the appellee's action here can be narrowly characterized as merely an action for assault and battery. The United States Supreme Court

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6. *See, e.g., Cramer v. Crutchfield*, 648 F.2d 943 (4th Cir. 1981) (state statute of limitations for personal injury actions applied in § 1983); *Rubin v. O'Koren*, 644 F.2d 1023 (5th Cir. 1981) (same); *Polite v. Diehl*, 507 F.2d 119 (3d Cir. 1974) (same); *Madison v. Wood*, 410 F.2d 564 (6th Cir. 1969) (same).

7. *See. e.g., Major v. Arizona State Prison*, 642 F.2d 311 (9th Cir. 1981) (state statute of limitations for liability created by statute applied in § 1983 suit); *Taylor v. Mayone*, 626 F.2d 247 (2d Cir. 1980) (same); *White v. Padgett*, 475 F.2d 79 (6th Cir. 1972), *cert. denied*, 414 U.S. 861 (1973) (same).

8. *See, e.g., Rinehart v. Locke*, 454 F.2d 313 (7th Cir. 1971) (general statute of limitations applied in § 1983 action); *Franklin v. City of Marks*, 439 F.2d 665 (5th Cir. 1971) (same).

has made it clear that an action commenced under 42 U.S.C. § 1983 alleging a deprivation of federal constitutional rights under color of state authority is a broad statutory remedy provided for by Congress. Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961). Although such a remedy may also exist at common law, there is an apparent distinction. The Ninth Circuit, in Smith v. Cremins, [308 F.2d 187, 190 (9th Cir. 1962)], explained this distinction:

> "Section 1983 of the Civil Rights Act clearly creates rights and imposes obligations different from any which would exist at common law in the absence of statute. A given state of facts may of course give rise to a cause of action in common-law tort as well as to a cause of action under Section 1983, but the elements of the two are not the same. The elements of an action under Section 1983 are (1) the denial under color of state law (2) of a right secured by the Constitution and laws of the United States. Neither of these elements would be required to make out a cause of action in common-law tort; both might be present without creating common-law tort liability.

[*Glasscoe v. Howell, supra*, 431 F.2d at 865.]

Because 42 U.S.C. § 1983 constitutes a statutory remedy for deprivation of constitutional rights, the panel concluded that either the three-year limitation for an action "founded on any contract or liability, express or implied," Ark. Stat. Ann. § 37-206 (which Arkansas courts had construed as covering actions based upon a liability created by statute), or the general five-year statute of limitations applied. The plaintiff had timely filed his suit under either state statute, and therefore the panel did not decide specifically which provision governs section 1983 actions. *Glasscoe v. Howell, supra*, 431 F.2d at 865.

The panel that decided *Savage v. United States, supra,* accepted the analogy between actions under section 1983 and state common law tort suits. Francis Savage sued a number of Minnesota state officials under section 1983 for depriving him of his civil rights by promoting the return of an indictment charging Savage and several others with mail fraud. When the state dismissed the indictment prior to trial, Savage alleged that the defendants had sought the indictment solely to put defamatory material before the grand jury. Focusing on the defendants' conduct rather than on the nature of the federal statutory cause of action, the panel ruled the action time-barred by the Minnesota two-year statute of limitations governing actions for defamation and malicious prosecution, Minn. Stat. § 541.-07(1).

> The deprivation of civil rights claims focus entirely on what was said and done by the various defendants in instigating and encouraging the return of the indictment charging Savage with mail fraud. It is alleged that this indictment was returned solely because the defendants conspired to put erroneous and defamatory material before Grand Jury. In this factual setting it is the Minnesota statute governing the timeliness of defamation and malicious prosecution actions which, in our view, best speaks to the general type of wrong and conduct sought to be prevented and deterred by §§ 1983 and 1985(3). Those federal statutes typically, but not exclusively, are employed as the means by which to redress intentional and tortious invasions of constitutionally assured rights; this state statute touches and concerns varieties of the same general type of wrong. It is thus evident, again, that § 541.07(1) presents an insurmountable barrier to the maintenance of this action in view of the late date on

which suit was commenced. We must hold that these civil rights claims are foreclosed by the 2-year bar of § 541.07(1). [*Savage v. United States, supra,* 450 F.2d at 451-52 (footnote omitted).]

This court has never reconciled the conflict created by *Glasscoe* and *Savage.* We have, at times, followed *Glasscoe* and focused on the federal statutory cause of action for deprivation of civil rights. *See, e.g., Lamb v. Amalgamated Labor Life Insurance Co.,* 602 F.2d 155 (8th Cir. 1979) (Missouri five-year statute of limitations for an "action upon a liability created by a statute," Mo. Rev. Stat. § 516.120, applied in civil rights actions alleging fraud and conspiracy to deprive insured of constitutional rights); *Clark v. Mann,* 562 F.2d 1104 (8th Cir. 1977) (Arkansas three-year statute of limitations previously construed by the state to apply to actions based upon a liability created by statute, Ark. Stat. Ann. § 37-206, applied in section 1983 action alleging deprivations of due process, equal protection, and first amendment rights by school district personnel policies and practices); *Williams v. Anderson,* 562 F.2d 1081 (8th Cir. 1977) (same); *Reed v. Hutto,* 486 F.2d 534 (8th Cir. 1973) (Arkansas three-year statute of limitations previously construed by state to actions based upon a liability created by statute, Ark. Stat. Ann. § 37-206, applied in section 1983 action by prisoner against former prison officials).

In other cases, we have followed *Savage* and applied the statute of limitations governing the common law tort most analogous to defendant's conduct. *See, e.g., Johnson v. Dailey,* 479 F.2d 86 (8th Cir.), *cert. denied,* 414 U.S. 1009 (1973) (Iowa two-year statute of limitations governing actions for malicious prosecution, Iowa Code § 614.1 ¶ 2, applied in section 1983 action against prosecuting attorney).

Decisions of the United States District Court for the Southern District of Iowa have mirrored these different approaches. *Compare Barrett v. Wichael,* 387 F. Supp. 1263 (S.D. Ia. 1974) (Iowa five-year general statute of limitations, Iowa Code § 614.1 ¶ 4, applied in section 1983 action against a county sheriff, following *Glasscoe v. Howell*), with *Rosales v. Lewis,* 454 F. Supp. 956 (S.D. Ia. 1978) (Iowa's two-year statute of limitations for actions "founded on injuries to person or reputation," Iowa Code § 614.1 ¶ 2, applied in section 1983 action against deputy sheriffs alleging excessive force during illegal arrest, following *Savage v. United States*) *and Silliman v. Rice,* No. 79-29-2 (S.D. Ia. Oct. 10, 1980) (order denying motion to dismiss) (Iowa's two-year statute of limitations, Iowa Code § 614.1 ¶ 2, applied to section 1983 action against county sheriff).

Despite their inconsistent positions, both parties to the litigation now before this court argue from a common premise: because Iowa has no specific statute of limitations for section 1983 actions[9] the state statute of limitations

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9. In response to inquiries by the court at oral argument, the parties commented on § 613A.5 of the Iowa Code which prescribes the "Limitation of Actions" for "Tort Liability of Governmental Subdivisions." The statute requires any person claiming damages against a municipality to commence the action within six months of the incident. If the municipality receives written notice describing the claim within six months of the incident, however, the plaintiff may commence the suit within two years after such notice.

In *Rosales v. Lewis,* 454 F. Supp. 956 (S.D. Ia. 1978), the court ruled that § 613A.5, which operates as both a claims provision and a statute of limitations, does not apply to actions brought under 42 U.S.C. § 1983.

> The purpose behind § 613A.5's shortened statute of limitations and notice provisions [i.e. to allow prompt investigation of the alleged tort], is less compelling in civil rights actions where liability is based upon personal responsibility which means that the defendants should have knowledge of the events at issue. [454 F. Supp. at 960.]

(Continued on following page)

for the most analogous type of action governs suits brought under section 1983. They differ, however, in the manner in which they determine the "analogous types of actions" under state law. The police officers urge the court to compare this suit to the state common law tort action available for the conduct giving rise to the federal cause of action. Garmon asks the court to compare the federal and state causes of action, rather than the underlying conduct.

The district court rejected the tort analogy and applied Iowa's general statute of limitations.

> * * * I am of the opinion, and hold, that the five year statute of limitations, Iowa Code § 614.1(4), applies for the reasons expressed by Judge Hanson in *Barrett v. Wichael,* 387 F. Supp. 1263 (S.D. Iowa 1974). (I have previously held that section 614.1(4) applies to claims for relief under 42 U.S.C. § 1981. *Russell v. Pittsburgh-Des Moines Steel Co.,* Civil No. 77-343-2 (S.D. Iowa March 19, 1980) (ruling on motion to dismiss).)
>
> Because this action was brought within five years of the date of the constitutional violation alleged by plaintiff, defendants' motion to reconsider the order of June 12, 1979, is denied. [*Garmon v. Foust,* No. 77-367-2 (S.D. Ia. Nov. 17, 1980) (order denying summary judgment).]

We agree and reject the tort analogy because it unduly cramps the significance of section 1983 as a broad, statutory remedy. Section 1983 provides a cause of action for deprivation of civil rights that in no way depends upon

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Footnote continued—

In this case, however, the state did not raise this provision as a defense in its motion to dismiss, in its motion to reconsider the denial of summary judgment, or in its brief to this court. Because it is axiomatic that the defendant bears the burden of raising the statute of limitations as an affirmative defense, we do not further consider the applicability of this section.

state common law. A litigant may pursue a section 1983 action rather than, or in addition to, state remedies. In his concurrence in *Monroe v. Pape*, 365 U.S. 167 (1961),[10] Justice Harlan described the difference between a state tort suit and a section 1983 action.

> [A] deprivation of a constitutional right is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy even though the same act may constitute both a state tort and the deprivation of a constitutional right. * * *[5]

---

[5]There will be many cases in which the relief provided by the state to the victim of a use of state power which the state either did not or could not constitutionally authorize will be far less than what Congress may have thought would be fair reimbursement for deprivation of a constitutional right. I will venture only a few examples. There may be no damage remedy for the loss of voting rights or for the harm from psychological coercion leading to a confession. And what is the dollar value of the right to go to unsegregated schools? Even the remedy for such an unauthorized search and seizure as Monroe was allegedly subjected to may be only the nominal amount of damages to physical property allowable in an action for trespass to land. It would indeed be the purest coincidence if the state remedies for violations of common-law rights by private citizens were fully appropriate to redress

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10. *Monell v. Dep't of Social Services*, 436 U.S. 658 (1978) later overruled the aspect of *Monroe v. Pape* which held local governments wholly immune from suit under § 1983.

those injuries which only a state official can cause and against which the Constitution provides protection. [*Id.* at 196 and n.5.]

In this case, Mark Garmon's complaint based on the warrantless seizure of his property and the subsequent search of his dormitory room, damaging his reputation and his earning capacity, does more than state a claim of "injuries to person or reputation." Garmon's assertion of a *constitutional right* not to be so treated by persons acting under color of state law provides the linchpin of his complaint under section 1983. We therefore adopt the reasoning articulated in *Glasscoe v. Howell, supra,* as the rule of the Eighth Circuit to be applied in this case and other similar cases.[11]

Accordingly, we affirm the district court's ruling that Iowa's general, five-year statute of limitations, Iowa Code § 614.1 ¶ 4, governs this section 1983 action.[12]

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

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11. Iowa has no specific period of limitations for actions based upon liability created by statute. Such a statute of limitations may appropriately govern an unlimited federal civil rights action. *See* note 7 *supra.*

12. Because this case involved a civil rights suit only under 42 U.S.C. § 1983, we limit our holding to actions specifically brought under that section. We recognize, however, that the rationale of this opinion may extend to actions under other sections of the Civil Rights Act, *e.g.*, §§ 1981, 1985.

APPENDIX B

(Filed November 17, 1980)

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

CIVIL NO. 77-367-2

MARK ALFRED GARMON,
Plaintiff,

v.

ROBERT FOUST, ROBERT ERVIN, and CHARLES CRAMER,
Defendants.

ORDER DENYING MOTION TO RECONSIDER ORDER OF JUNE 12, 1979

Defendants' motion to reconsider order filed June 12, 1979, and plaintiff's resistance to the motion are before the court.

On June 12, 1979, the Honorable Donald E. O'Brien, a judge of this court, entered an order denying defendants' motion for summary judgment, which presented defendants' claim that plaintiff's claim for relief is barred by the applicable Iowa statute of limitations. Judge O'Brien noted that there is a conflict in this district as to whether a two year statute of limitations (Iowa Code § 614.1(2)) or a

five year statute of limitations (Iowa Code § 614.1(4)) applies.[1] Judge O'Brien did not decide which applied; instead, he held that the applicable time limitation began to run when plaintiff discovered, or with reasonable diligence should have discovered, that defendants' conduct violated his constitutional rights, and proceeded from that holding to deny the motion for summary judgment because there appeared to be a genuine issue as to the material fact as to when plaintiff discovered or should have discovered that defendants' conduct violated his constitutional rights. (Plaintiff alleges he did not make such discovery until less than two years before he commenced this action.)

In their motion to reconsider Judge O'Brien's ruling, defendants assert that the two year statute of limitations applies and that Judge O'Brien erred in holding that the applicable limitations began to run when plaintiff discovered, or should have discovered, that defendants' conduct violated his constitutional rights, citing cases decided since Judge O'Brien's order.

I do not need to decide, or express an opinion in respect to, the question of when the applicable time limita-

---

1. Iowa Code § 614.1 provides:

Period. Actions may be brought within the times herein limited, respectively, after their causes accrue, and not afterwards, except when otherwise specially declared:

• • •

2. *Injuries to person or reputation—relative rights—statute penalty.* Those founded on injuries to the person or reputation, including injuries to relative rights, whether based on contract or tort, or for a statute penalty, within two years.

• • •

4. *Unwritten contracts—injuries to property—fraud—other actions.* Those founded on unwritten contracts, those brought for injuries to property, or for relief on the ground of fraud in cases heretofore solely cognizable in a court of chancery, and all other actions not otherwise provided for in this respect, within five years, except as provided by subsection 8.

tion began to run because I am of the opinion, and hold, that the five year statute of limitations, Iowa Code § 614.-1(4), applies for the reasons expressed by Judge Hanson in *Barrett v. Wichael*, 387 F. Supp. 1263 (S.D. Iowa 1974). (I have previously held that section 614.1(4) applies to claims for relief under 42 U.S.C. § 1981. *Russell v. Pittsburgh-Des Moines Steel Co.*, Civil No. 77-343-2 (S.D. Iowa March 19, 1980) (ruling on motion to dismiss).)

Because this action was brought within five years of the date of the constitutional violation alleged by plaintiff, defendants' motion to reconsider the order of June 12, 1979, is denied.

The conflict of opinion among the judges of the Southern District of Iowa as to which Iowa statute of limitations is applicable in section 1983 cases, noted by Judge O'Brien in footnote 1 of his order of June 12, 1979, continues to exist. And in *Barrett v. Wichael, supra*, Judge Hanson noted that "Eighth Circuit Court of Appeals decisions have reached seemingly irreconcilable results on this issue." Therefore, I am of the opinion that there is substantial ground for difference of opinion and that an immediate appeal from this order may materially advance the ultimate termination of this litigation.

If application for appeal under 28 U.S.C. § 1292(b) is timely taken, proceedings in this court shall be stayed.

DATED this 17th day of November, 1980.

/s/ Harold D. Vietor
Harold D. Vietor
United States District Judge

Opposition

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NO. 81-1813

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

ROBERT FOUST, ROBERT ERVIN, and
CHARLES CRAMER, PETITIONERS

v.

MARK ALFRED GARMON, RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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IN THE SUPREME COURT OF THE UNITED STATES

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THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

QUESTION PRESENTED FOR REVIEW

Whether the Eighth Circuit Court of Appeals applied the correct State's statute of limitations to this action under 42 U.S.C., §1983.

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OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. A1-A14) is reported at 668 F.2d 400. The order of the district court (Pet. App. A15-A17) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on January 5, 1982. The petition for a writ of certiorari was filed March 30, 1982. This court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATEMENT

On December 17, 1975, Petitioner, Robert Foust, a police officer employed by the City of Des Moines, received a package from employees of Drake University. This package was addressed to the Respondent, Mark Garmon, and had arrived through the mail at the University dormitory where Respondent had been residing. Without a search warrant or probable cause, Petitioner Foust took the package to a State Judge who ordered it opened. After discovering that the package contained a green, leafy substance, Foust resealed it.

Soon thereafter, a search warrant was issued authorizing a search of Respondent's dormitory room. Petitioners Robert Ervin and Charles Cramer executed the warrant by searching Respondent's room and as a result discovered a controlled substance.

Respondent was subsequently charged under state law with the crime of possession of a controlled substance. His court-appointed attorney successfully moved for suppression of the evidence seized from his dormitory room and as a result the State charge was dismissed.

On December 20, 1977, more than two years later, Respondent brought a cause of action in Federal District Court against the Petitioners under 42 U.S.C. §1983. In his complaint, Respondent alleged that the Petitioners, as a result of the illegal search and seizure which had occurred in December of 1975, violated the

Respondent's rights under the Fourth and Fourteenth Amendments to the United States Constitution and did so while acting under color of state law. Additionally, Respondent alleged that as a result of the alleged violations, he suffered emotional distress, damage to his reputation and impaired earning capacity.

Thereafter, Petitioners asserted Iowa's two-year statute of limitations as a defense to Respondent's claim for relief. The District Court found that Iowa's general, five-year statute of limitations, §614.1(4), Code of Iowa, was the appropriate limitation period rather than Iowa's two-year statute of limitations under §614.1(2), Code of Iowa. In his Order finding that Iowa's five-year statute of limitations the applicable limitation period, the Court also certified the case for interlocutory appeal under 28 U.S.C. §1292(b).

Petitioners thereafter sought permission from the Eighth Circuit Court of Appeals to appeal. The Court granted permission for the appeal and the case was argued to that Court en banc. On January 5, 1982, the Eighth Circuit Court of Appeals in a unanimous decision affirmed the Trial Court and in so doing found that Iowa's five-year statute of limitations applied to actions brought under 42 U.S.C. §1983.

ARGUMENT I

THE DECISION BELOW DOES NOT CONFLICT WITH THE DECISIONS OF THE OTHER COURTS OF APPEAL IN APPLYING THE MOST ANALOGOUS TYPE OF ACTION AND THIS COURT SHOULD NOT DISTURB THE EIGHTH CIRCUIT'S RULING.

Initially, the Petitioners have repeatedly misstated both the nature of the Respondent's action and the underlying issue in this controversy. Although the Petitioners have carefully characterized the Respondent's action as a "personal injury action," Mr. Garmon's claim requests damages for a constitutional deprivation. As the Eighth Circuit's decision indicated: "Garmon's assertion of a constitutional right not to be so treated by persons acting under color of state law provides the linchpin of his complaint under section 1983." (Original emphasis).

In fact, Mr. Garmon has relied solely upon the federal statutory remedy provided by 42 U.S.C. §1983. Viewing the Respondent's action as one for compensating constitutional deprivations provides the proper focus for analyzing the lower court's decision.

The Eighth Circuit's decision in this case is consistent with the general principle used by this court and the other Circuit Courts of Appeal to determine the statute of limitations for lawsuits brought pursuant to 42 U.S.C. §1983. Both the Rules and Decision Act, 28 U.S.C. §1652, 1976),[1] and §1988 of the Civil Rights Act, 44 U.S.C. §1988,[2] require application of the state statute limitations where the federal provisions are not limited.

"[T]he general rule is to apply the state statute of limitations for analogous types of actions." Chevron Oil Company v. Huson, 404 U.S. 97, 104 (1971). This decision must take into consideration the decisional law of the controlling state as well as state statute. Board of Regents v. Tomanio, 446 U.S. 478 (1980).

Based upon the general principles, the federal court is required to apply the decisional and statutory authority of the state whose law applies to the particular cause before the court. As each state is likely to possess distinguishing law, it is unreasonable to expect a uniform statute of limitations from the

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[1]The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

[2]The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this title, and of the title "Civil Rights" and the title "Crimes," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in provisions necessary to furnish stable remedies and punish offenses against law, the common law, as modified and changed by the Constitution and statutes wherein the Court having jurisdiction of such civil or criminal case is held so far as the same is not inconsistent with the Constitution and the laws of the United States, shall be extended to and governed the said courts in the trial and disposition of the cause, and, if it is of a criminal nature in the infliction of the punishment on the party found guilty.

various federal, district and circuit courts. Indeed, in Robertson v. Wegmann, 436 U.S. 584, 595, n. 11 (1978), this court commented that a lack of uniformity was a necessary result of reliance on state law.

Considering the distinctions in state law, it is not surprising that the several Courts of Appeal have used different analogies in attempting to classify a particular action under 42 U.S.C. §1983. See Pet. App., A6-A7, n. 6-8. However, the differing characterizations of §1983 does not require this court to grant the Petition for Writ of Certiorari. First, the correctness of the Eighth Circuit's decision in this case does not depend upon a matter of federal law, but the application of state (Iowa) law to a federal cause of action. Second, the federal court's standards for the application of state tolling statutes have already been elucidated by this court through its decision in Board of Regents v. Tomanio, 446 U.S. 478 (1980) and Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975). Finally, as more fully discussed in §2, infra, the lower court's decision is in direct compliance with this court's previous rulings guiding the proper application of statutes of limitation in §1983 lawsuits.

This case does not concern an important federal question. Instead, state principles of law and policy are applied by the federal court. As long as the state law does not appear inconsistent with federal or constitutional provisions, the Rules and Decisions Act requires an application of the state's law. 28 U.S.C. §1625. No important federal question must be resolved when the court is merely applying the legal principles of the state.

There should be no question as to the application of state law. In Tomanio the Court stated: ". . . this Court has repeatedly 'borrowed' the state law of limitations governing an analogous cause of action." Tomanio at 446 U.S. 484. This Court in Tomanio found that it had, ". . . emphasized the importance of the policies underlying state statutes of limitation." Id. at 487.

In this case, the lower court's decision complies with the

state law and policies of Iowa. As the following argument will reveal, the Eighth Circuit's decision here follows both federal and Iowa law. Thus, there is no compelling reason for the grant of a writ of certiorari.

ARGUMENT II

THE DECISION BELOW FOLLOWS THE PRECEDENT OF THIS COURT IN DETERMINING THE STATUTE OF LIMITATIONS APPLICABLE TO 42 U.S.C. §1983.

The Eighth Circuit Court of Appeals held that Iowa's five-year statute of limitations applied to Mark Garmon's federal civil rights action. The Circuit Court's decision was mandated by both federal and state law. The result was not only consistent with the broad remedial purpose of §1983 but required by Iowa law. As indicated above, page , the decisional and statutory law of the state determines the appropriate statute of limitations. Tomanio, supra; Johnson, supra. In this case, Iowa law unquestionably requires application of the five-year statute of limitations.

It is useful to note that Iowa law has historically given special attention to the federal causes of action and the acts or omissions of officials. From 1943 to 1945 the State of Iowa limited actions arising under federal statutes to six months. Acts 1943 (54 G.A., Ch. 267, §1).[3]

In addition, liability incurred by a sheriff or other public officer while acting in their official capacity was limited to three years and actions for false arrest were limited to six months. Iowa Code Annotated, §614.1 (1981). These provisions were removed in 1967. Acts (1967) 62 G.A. Ch. 403, §12, effective July 27, 1967. Thus, the Iowa legislature has been concerned with statutes of limitation for causes of action such as §1983 for almost 40 years.

---

[3]This provision stated: In all cases wherein a claim or cause of action has arisen or may arise pursuant to provisions of any federal statute wherein no period of limitation is prescribed, the holder of such claim or cause of action may commence action thereon within but not after a period of six months after March 1, 1943, if such claim or cause of action arose prior to March 1, 1943, or within but not later than six months after the accrual of such claim or cause of action if such claim or cause of action arose after March 1, 1943. (Repealed by Acts 1945, 51 G.A. Ch. 222, §1).

It cannot be said that the Iowa legislature has inadvertently failed to include a statute of limitations for the types of action concerned in this controversy. The legislative history of providing specific limitations for the type of action brought by Mr. Garmon clearly indicates that those actions were not considered by the Iowa legislature to be included within the personal injury category.

Although the petitioners seek to impose the personal injury limitation of §614.2 of the Iowa Code, that provision cannot apply under current Iowa law. In Clark v. Figge, 181 NW 2d 211, 214 (Iowa 1971) the Iowa Supreme Court defined the types of actions brought for "injuries to the person or reputation" as "bodily hurts or death or false imprisonment" and "publication of standards or libelous material." The Clark court went further to specify that the reference to relative rights in §614.2 did not expand the scope of the statute. Id. That phrase is applicable to actions such as loss of consortium. Id.

The general Iowa policy regarding tolling limitations also supports the application of the five-year statute of limitation. The statute of limitation defense which the Petitioners seek to use is disfavored under Iowa law. Sprung v. Rasmussen, 180 NW 2d 430, 433 (Iowa 1970). Even if there were a potential application of the shorter personal injury limitation, the Iowa Supreme Court has held that the longer of two potentially applicable limitation provisions must be applied. Orr v. Lewis Central School District, 298 NW 2d 256 (Iowa 1980).

In addition to these considerations, the Iowa court has specifically provided that the five-year statute of limitation, §614.4, is the correct period for liability created by statute. Preston v. Howell, 219 Iowa 230, 257 NW 415, 425 (1934). In Preston the court held that the action was ". . . founded upon a strictly statutory liability and is therefore included within the terms of paragraph five, which includes "all other actions not otherwise provided for in this respect, within five years." Id. (Emphasis original). Plainly, §1983 can only be a statutory

cause of action providing statutory liability.

Following the standards of this court in applying the statutory and decisional law of the State of Iowa, the only appropriate limitation is that applied by the lower court. However, the lower court's decision also maintains the integrity of the congressional remedy provided by §1983.

This court has repeatedly commented on the breadth and remedial nature of the statute. Owen v. City of Independence, 445 U.S. 635, 637 (1980); Monell v. New York City Dept. of Social Services, 436 U.S. at 658, 685 (1978).

A statement made by Mr. Hoar of Massachusetts during the debates over the enactment of §1983 demonstrates the broad equity which the statute was designed to implement.

> The question is not whether a majority of the people in a majority of the States are likely to be attached to and able to secure their own liberties. The question is not whether the majority of the people in every State are not likely to desire to secure their own rights. It is, whether a majority of the people in every State are sure to be so attached to the principles of civil freedom and civil justice as to be as much desirous of preserving the liberties of others as their own, as to insure that under no temptation of party spirit, under no political excitement, under no jealousy of race or caste, will the majority either in number or strength in any State seek to deprive the remainder of the population of their civil rights. Cong. Globe, 42nd Cong., 1st Sess. 653.

These precepts of relief under a federal cause of action are accentuated by the lower court's ruling in this case. Recognizing the distinction between the common law tort and §1983's remedy for constitutional deprivations, the Eighth Circuit dismissed the application of the personal injury limitation. Instead, the court satisfied the rationales and requirements of both federal and state law by applying §614.4, the five-year statute of limitations. Under these circumstances the Petition for Writ of Certiorari must be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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NO. 81-1813

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

ROBERT FOUST, ROBERT ERVIN, and
CHARLES CRAMER, PETITIONERS

v.

MARK ALFRED GARMON, RESPONDENT

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS
BY RESPONDENT

I, Mark Alfred Garmon, the Respondent, respectfully move the Court for leave to proceed herein in forma pauperis in accordance with the provisions of Title 28, United States Code, §1915(a), and to file herein his response to the petition for Writ of Certiorari to the Court of Appeals for the Eighth Circuit filed by the Petitioners in single counterpart, without printing the same. The typed brief of Respondent in opposition is presented herewith for filing.

The affidavit of Respondent in support of this motion is filed herewith.

Dated this 29 day of April, 1982.

Respectfully submitted,

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COUNSEL OF RECORD FOR RESPONDENT

CERTIFICATE OF SERVICE

I, John P. Roehrick, attorney of record for Mark Alfred Garmon, Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 4th day of May, 1982, I served copies of the attached Motion for Leave to Proceed In Forma Pauperis on Robert Foust, Robert Ervin and Charles Cramer, Petitioners herein, by mailing a copy in a duly addressed envelope with postage thereon prepaid to Mr. James Sullivan, Esq., Attorney of record for Petitioners, at his last known address of East First and Locust Streets, Des Moines, Iowa, 50307.

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Attorneys for Respondent

NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

ROBERT FOUST, ROBERT ERVIN, and
CHARLES CRAMER, PETITIONERS

v.

MARK ALFRED GARMON, RESPONDENT

AFFIDAVIT IN SUPPORT OF LEAVE TO PROCEED IN FORMA PAUPERIS

STATE OF CALIFORNIA)
SAN BERNADINO) ss:
COUNTY OF _____)

I, Mark Alfred Garmon, being first duly sworn, depose and state as follows:

1. That I am the Respondent in the above-entitled action and make this affidavit in support of my motion for leave to proceed in forma pauperis herein.

2. That I am 26 years old and currently employed as a general helper at the General Electric plant located in Ontario, California.

3. That I receive a salary weekly with a gross pay of $350.00 per week and a net take-home pay of $290.00 per week.

4. That my current monthly living expenses are $725.00 and consist of:

a.	Rent	$285.00
b.	Food	180.00
c.	Utilities	70.00
d.	Phone	20.00
e.	Transportation	150.00
f.	Clothing	20.00

5. That I have the following debts in the following amounts:

a.	Gulf Oil	$286.00
b.	Mercy Hospital of Cincinnati, Ohio	37.00
c.	Dr. Randolph of Hamilton, Ohio	190.00
d.	Mrs. Meyers - personal loan	167.00
e.	Mr. Schmidt, patent lawyer	50.00
f.	Sears	200.00

6. That I own no real property.

7. That I have no bank account except for a checking account which has very little cash.

8. That I own no stocks, bonds, automobiles or valuable property, either real or personal except for personal affects and wearing apparel.

9. That I am unable to bear the printing costs to reproduce the brief in opposition.

10. That because of my financial condition I am unable to pay fees and pay or give security for costs on this appeal and still be able to provide myself with the necessities of life.

11. That this is a petition for writ of certiorari and I believe that I am entitled to file this brief in opposition.

Mark Alfred Garmon 4/21/82

Subscribed and sworn to, before me, this _____ day of _____, 1982.

STATE OF CALIFORNIA
COUNTY OF San Bernardino } ss.

On April 29, 1982 before me, the undersigned, a Notary Public in and for said State, personally appeared Mark Alfred Garmon* * * *

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SUPREME COURT, U.S.

IN THE SUPREME COURT

OF THE UNITED STATES

* * * * *

ROBERT CHEVERES,	:	
Petitioner	:	
VERSUS	:	CASE NO. 81-1497
SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF VENTURA, GLENDA CHEVERES MILLER, (Real Party in Interest),	:	
Respondents	:	

AFFIDAVIT IN SUPPORT OF MOTION
TO PROCEED ON APPEAL IN FORMA PAUPERIS

I, GLENDA CHEVERES MILLER, being first duly sworn, depose and say that I am the Defendant, in the above entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that the issues which I desire to present on appeal are the following:

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed? Yes.

a. $51.60.

Goudeau's Health and Racquetball Club
2318 Ferrand, Monroe, Louisiana.

2. Have you received within the past twelve months any income from a business, profession or other form of

self-employment, or in the form of rent payments, interest, dividends, or other source?

a. No.

3. Do you own any cash or checking or savings account?

Yes.

a. Total Value: $1,186.42.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

a. Yes.

i. Eight acres in Florida valued at $3,000.00 to $6,000.00 per acre.

ii. 1977 Cordoba valued at $2,000.00 to $3,000.00.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

a. Monique Cheveres, daughter.

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

Glenda Cheveres-Miller
GLENDA CHEVERES MILLER

SUBSCRIBED AND SWORN TO before me this 7th day of May, 1982.

Virginia Laing
NOTARY PUBLIC

ORDER

Let the applicant proceed without prepayment of costs or fees or the necessity of giving security therefor.

DISTRICT JUDGE